APPENDIX

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1334

DONALD BORDENKIRCHER, Superintendent
Kentucky State Penitentiary

Petitioner

—v.—

PAUL LEWIS HAYES

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 28, 1977
CERTIORARI GRANTED JUNE 6, 1977

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 76-1334

DONALD BORDENKIRCHER, SUPERINTENDENT KENTUCKY STATE PENITENTIARY

Petitioner

-V-

PAUL LEWIS HAYES

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Proceedings

Date 1975	
6-11	Order filed and entered; Petitioner granted leave to proceed in forma pauperis; Petition for Writ of Habeas Corpus heretofore tendered ordered filed. Copies as noted.
6-11	Petition for Writ of Habeas Corpus with affidavit in support thereof filed. (Copies of record on file with Court of Appeals of Kentucky)
6-11	Magistrate's Report and Recommendation filed. Copies as noted.
9- 9	Order filed and entered; Magistrate's Report and Recommendation heretofore filed be and the same is adopted, confirmed, approved, allowed and established as and for the Court's Findings of Fact and Conclusions of Law; Petitioner's Petition for Writ of Habeas Corpus be and the same is denied; Cause is hereby dismissed. Copies as noted with notice of entry given.

10- 9 Petitioner's Notice of Appeal filed with Application for Certificate of Probable Cause.

12-19 Order filed and entered: Court specifically finds that the appeal sought herein is frivolous, is not taken in good faith, and does not present a substantial question, and is denied and the Court declines to issue a Certificate of Probable Cause. Copies as noted.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 76-1409

DATE 1976	FILING—PROCEEDINGS
3-15	Order granting certificate of probable cause.
4- 7	Certified Record filed; cause docketed
5-17	Brief for Petitioner-Appellant
5-17	Proof of Service for Brief for Petitioner-Appellant
6-14	Brief for Respondent-Appellee
6-14	Proof of Service for Brief for Respondent-Appellee
10-26	Notice for oral argument
11-18	Cause argued and submitted (Before: Peck, McCree and Lively, JJ.)
12-20	Motion for leave to file supplemental citation of authority.
12-30	Dismissal of petition reversed and case remanded with instructions to order petitioner's discharge except for his confinement under a lawful sentence imposed solely for the crime of uttering a forged instrument
12-30	Opinion by McCree, J.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

1977

1-25	Motion for stay of mandate
2- 2	Order staying mandate thirty days
3- 1	Motion for extension of time for stay of mandate
3- 1	Opposition to Appellee's motion for extension of time for stay of mandate
3-25	Notice of filing petition for writ of certiorari
3-29	Certified copy of order of Supreme Court granting certiorari on 3-28-77

FAYETTE CIRCUIT COURT

THE COMMONWEALTH OF KENTUCKY
Plaintiff

vs: INDEX No. 73-C-26 and 73-C-29

PAUL LEWIS HAYES
Defendant

* * * * *

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STATE OF KENTUCKY
Fayette Circuit Court

THE COMMONWEALTH OF KENTUCKY ... PLAINTIFF

VS: TRANSCRIPT OF RECORD No. 73-C-26 and 73-C-29

PAUL LEWIS HAYES ... DEFENDANT

* * * * *

Proceedings of the Fayette Circuit Court (Twenty-Second Judicial District) of Kentucky in the Circuit Court Room of the Fayette County Court House in the City of Lexington.

Honorable James Park, Jr. sitting as Circuit Judge, of Division No. 1.

Be it remembered that heretofore, to-wit:

On the 8th day of January, 1973, the Grand Jury of Fayette County returned into Court an indictment against Paul Lewis Hayes and Larry Wayne Frazier, endorsed in words and figures as follows, to-wit:

THE COMMONWEALTH OF KENTUCKY

Fayette Circuit Court
DIVISION NO. 1
JANUARY 8, 1973
JAN. TERM, 1973
Indictment No. ~~8788~~
73-C-26

THE COMMONWEALTH OF KENTUCKY	**Indictment for: Uttering a Forged Instrument**
VS.	
PAUL LEWIS HAYES **LARRY WAYNE FRAZIER**	**KRS 434.130**

The Grand Jury charges:

On or about the 20th day of November, 1972. in Fayette County, Kentucky, the above named defendants uttered a forged instrument, a check drawn on the account of Brown Machine Works in the amount of $88.30.

against the peace and dignity of the Commonwealth of Kentucky.

A TRUE BILL

/s/_____
Foreman

FAYETTE CIRCUIT COURT
FIRST DIVISION
January 19, 1973

COMMONWEALTH OF KENTUCKY, ... PLAINTIFF

VS: INDICTMENT (ARRAIGNMENT) NO. ~~8788~~ 73-C-26

PAUL LEWIS HAYES ..... DEFENDANT

* * * * *

The Commonwealth came by Attorney; defendant appeared and being represented by counsel, Hon. A. Norrie Wake; and defendant, with advice of counsel, waived formal arraignment and entered a plea of NOT guilty to the indictment.

It is ordered by the Court that this cause be assigned a pre-trial conference on Wednesday, January 24, 1973 at 9:30 a.m.

/s/ James Park, Jr.

_____
Judge, Fayette Circuit Court

FAYETTE CIRCUIT COURT
DIVISION 1

COMMONWEALTH OF KENTUCKY ..... PLAINTIFF

VS: PRE-TRIAL ORDER INDICTMENT NO. ~~5736~~ 73-C-28

PAUL LEWIS HAYES ..... DEFENDANT

* * * * *

This matter having been assigned for a pre-trial conference; the attorneys having indicated to the Court that the pre-trial conference was held on January 24, 1973; and the Court being sufficiently advised,

IT IS HEREBY ORDERED, as checked below:

The Defendant's motion is assigned for hearing before the Court at _____ A.M./P.M. on _____ the_____ day of _____, 197—.

✓ This matter is assigned for trial by jury at 9:00 A.M. on Wednesday, the 14th day of February, 1973.

The Defendant's Petition to Enter Plea of Guilty is assigned for hearing before the Court at _____ A.M./P.M. on _____, the _____ day of _____ 197—.

✓ This matter is set for a further pre-trial conference at 3:30 P.M. on Friday, January 26th, 1973. Anthony

Todd is substituted as attorney of record in place of A. Norrie Wake.

/s/ James Park, Jr.
JUDGE

TO BE ENTERED:
SERVICE AND NOTICE OF ENTRY WAIVED:

/s/ Glen S. Bagby
Attorney For Commonwealth

ATTORNEY(S) FOR DEFENDANT(S):

/s/ A. Norrie Wake
A. Norrie Wake

/s/ Anthony Todd
Anthony Todd

THE COMMONWEALTH OF KENTUCKY

Fayette Circuit Court
DIVISION NO. 2
JANUARY 29, 1973

January Term, 1975
INDICTMENT NO. 73-C-29

THE COMMONWEALTH OF KENTUCKY	**COUNT NO. 1:** **Indictment for: Uttering a Forged Instrument** **KRS 434.130**
VS.	
PAUL LEWIS HAYES	**COUNT NO. 2** **Indictment for - Habitual Criminal KRS 431.190**

The Grand Jury charges:

COUNT NO. 1:

On or about the 20th day of November, 1972, in Fayette County, Kentucky, the above named defendant uttered a forged instrument, a check, drawn on the account of Brown Machine Works against the peace and dignity of the Commonwealth of Kentucky.

COUNT NO. 2:

Prior to the commission of the offense set forth in Count No. 1 above, the defendant committed and was convicted of the following felonies:

(1) Detaining a Female Against Her Will For the Purpose of Having Carnal Knowledge of Her;

committed on July 19, 1961; convicted by the Fayette Circuit Court on April 26, 1962 and sentenced to seven years in the penetentiary (sic); and

(2) Robbery; committed on January 2, 1970; convicted by the Fayette Circuit Court on January 18, 1971 and sentenced to five years in the penetentiary (sic)

against the peace and dignity of the Commonwealth of Kentucky.

A TRUE BILL

/s/ _____
Forman

FAYETTE CIRCUIT COURT
FIRST DIVISION
February 2, 1973

COMMONWEALTH OF KENTUCKY, ... PLAINTIFF

VS: INDICTMENT NO. 73-C-29
(ARRAIGNMENT)

PAUL LEWIS HAYES ... DEFENDANT

* * * * *

The Commonwealth came by Attorney; defendant appeared and being represented by counsel, Hon. Anthony Todd; and defendant, with advice of counsel, waived formal arraignment and entered a plea of NOT guilty to Ct. 1 of this indictment, and upon formal arraignment to Ct. 2 of this indictment, entered a plea of NOT guilty.

It is ordered by the Court that this cause be assigned a pre-trial conference this day and a trial date of February 14, 1973.

/s/ James Park, Jr.

Judge, Fayette Circuit Court

FAYETTE CIRCUIT COURT
DIVISION 1
FEBRUARY 2, 1973

COMMONWEALTH OF KENTUCKY ... PLAINTIFF

VS: PRE-TRIAL ORDER INDICTMENT NO. 73-C-29

PAUL LEWIS HAYES ... DEFENDANT

* * * * *

This matter having been assigned for a pre-trial conference; the attorneys having indicated to the Court that the pre-trial conference was held on February 2nd, 1973; and the Court being sufficiently advised,

IT IS HEREBY ORDERED, as checked below:

The Defendant's motion is assigned for hearing before the Court at _____ A.M./P.M. on _____ the _____ day of _____, 197__.

✔ This matter is assigned for trial by jury at 9:00 A.M. on Wednesday, the 14th day of February, 1873.

The Defendant's Petition to Enter Plea of Guilty is assigned for hearing before the Court at _____ A.M./P.M. on _____ the _____ day of _____, 197__.

_____

/s/ James Park, Jr.

JUDGE

TO BE ENTERED:
SERVICE AND NOTICE OF ENTRY WAIVED:

/s/ Glen S. Bagby

ATTORNEY FOR COMMONWEALTH

/s/ W. A. Todd

ATTORNEY(S) FOR DEFENDANT(S):

FAYETTE CIRCUIT COURT
FIRST DIVISION
February 14, 1973

THE COMMONWEALTH OF KENTUCKY, Plaintiff **VS.** **PAUL LEWIS HAYES, Defendant**	**ORDER; Continued** **Indictment No. 73-C-29 & 73-C-26** **Charge: Ct. 1-Uttering a Forged Instrument; Ct-2-Habitual Crim.**

* * * * *

It is ORDERED by the COURT that the above styled case be continued until further ordered by the Court, due to the defense attorney's illness.

/s/ James Park, Jr.

Judge, Fayette Circuit Court

FAYETTE CIRCUIT COURT
Criminal Branch
FIRST DIVISION
March 28, 1973

COMMONWEALTH OF KENTUCKY **PLAINTIFF**

VS: **ORDER ASSIGNING FOR TRIAL** **NO. 73-C-29**

PAUL HAYES **DEFENDANT**

* * * * *

Upon Motion of the Commonwealth and the Court being advised,

IT IS HEREBY ORDERED AND ADJUDGED that the above styled cause will come on for trial on April 19, 1973 in the Fayette County Court House.

Dated this 28th day of March, 1973.

/s/ James Park, Jr.

Judge

March 28 1973
FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
Division No. 1

COMMONWEALTH OF KENTUCKY Plaintiff

vs. ORDER OF ATTENDANCE No. 73-C-29

PAUL LEWIS HAYES Defendant

* * * * *

Upon motion of Attorney for the Commonwealth to the effect that the personal attendance of LARRY WAYNE FRAZIER at the trial of the above action on APRIL 19, 1973, at 9:00 A M. in the Courtroom on the 3rd floor of the Fayette County Courthouse, is necessary, and the Court being advised, it is hereby;

ORDERED that LARRY WAYNE FRAZIER now confined in KENTUCKY STATE REFORMATORY in LA GRANGE, Kentucky, personally appear in this Court on APRIL 19, 1973 at 9:00 A.M., in the Circuit Courtroom, 3rd floor, Fayette County Courthouse, at Lexington, Kentucky for the trial of the above styled action and not to depart without leave of Court and it is FURTHER ORDERED that the appropriate officers having custody of said defendant make the necessary provisions to supervise in transit the custody of said defendant and to produce said defendant in this Court at the time above stated. If for any reason the presence of said defendant is nec-

essary for longer than one day, the officer having custody of him may deliver him to the Fayette County Jailer, who is directed to keep him in the custody of the Fayette County Jail until his presence has been excused, whereupon said defendant shall be returned to LA GRANGE, Kentucky by the SHERIFF of Fayette County.

/s/ James Park, Jr.

Judge, Fayette Circuit Court

FAYETTE CIRCUIT COURT
FIRST DIVISION
April 19, 1973

COMMONWEALTH OF KENTUCKY Plaintiff VS. PAUL LEWIS HAYES, Defendant	TRIAL, VERDICT & JUDGMENT Indictment No. 73-C-29 Charge: Ct. 1—Uttering a Forged Instrument

* * * * *

This 19 day of April, 1973, the defendant, PAUL LEWIS HAYES having appeared in open court with his attorney Hon. Anthony Todd, and the Commonwealth came by Attorney, Hon. Glen S. Bagby

Thereupon came the following jury, to-wit:

Charles E. Elkins, Esther S. Carrea, Elsie Noel, Kenneth W. Roberts, Nancy Rust, Carrie B. Jackson, Melvin Cobb, Mary Lee Davis, Shirley Driver, William K. Clark, James E. Gay, Ola Jean Bottom who were duly empaneled and sworn to hear the case.

Mrs. Peggy Hood, the Official Stenographic Reporter of this Court was directed to record the testimony and proceedings of this trial.

Motions and rulings made during the trial are as shown in the official transcript

The trial progressed and being concluded the jury retired and returned into Court the following verdict, viz:--

"We, the jury, find the defendant guilty as charged in the indictment.

Charles Elkins, Foreman"

By agreement of all parties the jury was allowed to separate under admonition of the Court until Monday, April 23, 1973 at 9:00, to complete further hearing of the case.

/s/ James Park, Jr.

Judge, Fayette Circuit Court

COMMONWEALTH OF KENTUCKY
vs.
PAUL LEWIS HAYES

INSTRUCTIONS TO THE JURY

1. If the jury shall believe from all the evidence beyond a reasonable doubt that:

(a) On April 26, 1962, the defendant, Paul Lewis Hayes, was convicted in the Fayette Circuit Court of the crime of detaining a female against her will for the purpose of having carnal knowledge of her, a felony; and that

(b) on January 18, 1971, the defendant, Paul Lewis Hayes, was convicted in the Fayette Circuit Court of the crime of robbery, a felony, and that said crime of robbery was committed after April 26, 1962; and that

(c) the offense of uttering a forged instrument for which you have found the defendant guilty in this case was committed after January 18, 1971, then you shall fix the defendant's punishment at imprisonment in the penitentiary during his life.

2. If the jury shall have a reasonable doubt from all the evidence that the defendant, Paul Lewis Hayes, was convicted in the Fayette Circuit Court on April 26, 1962, of the crime of detaining a female against her will for the purpose of having carnal knowledge of her, but if the jury shall believe from all the evidence beyond a reasonable doubt that the defendant, Paul Lewis Hayes, was convicted in the Fayette Circuit Court on January 18, 1971, of the crime of robbery and that he received a sentence of five (5) years for such offense, and that the offense of uttering a forged instrument for which you have found

the defendant guilty in this case was committed after January 18, 1971, then you shall fix the defendant's punishment at confinement in the state penitentiary for a period of ten (10) years.

3. If the jury shall have a reasonable doubt from all the evidence that the defendant, Paul Lewis Hayes, was convicted in the Fayette Circuit Court on January 18, 1971, of the crime of robbery, but if the jury shall believe from the evidence beyond a reasonable doubt that the defendant, Paul Lewis Hayes, was convicted in the Fayette Circuit Court on April 26, 1962, of the crime of detaining a female against her will for the purpose of having carnal knowledge of her and that he receivd a sentence of seven (7) years for such offense, and that the offense of uttering a forged instrument for which you have found the defendant guilty in this case was committed after April 26, 1962, then you shall fix the defendant's punishment at confinement in the state penitentiary for a period of fourteen (14) years.

4. If the jury shall have a reasonable doubt that the defendant has been convicted of any prior felony mentioned in Instruction No. 1 above, then you shall fix the defendant's punishment at confinement in the state penitentiary for not less than two nor more than ten years, in your discretion.

5. Your verdict must be unanimous, one of your number signing as foreman.

We, the jury fix the denfendant's punishment at imprisonment in the state penitentiary for life.

CHARLES E. ELKINS, Foreman

FAYETTE CIRCUIT COURT
FIRST DIVISION
April 23, 1973

COMMONWEALTH OF KENTUCKY Plaintiff

vs. No. 73C26 & 73C29

PAUL LEWIS HAYES Defendant

* * * * *

The Commonwealth came by Attorney; defendant appeared and being represented by counsel, Hon. Anthony Todd, and the jury empaneled herein met pursuant to adjournment.

The trial progressed and being concluded the jury retired and returned into Court the following verdict, viz:—

"We, the jury fix the defendant's punishment at imprisonment in the state penitentiary for life.

CHARLES E. ELKINS, Foreman"

The Court inquired of the defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and no sufficient cause was shown why judgment should not be pronounced, and it is therefore by the Court;

ADJUDGED that the defendant is guilty of the crime of Ct. 2—Habitual Criminal and he shall be confined in the State Penitentiary for and during the period of the remainder of his natural life; and this sentence is to run concurrently with prior conviction on Indictment No. 8610.

After fixing sentence, the Court informed the defendant that he has a right to appeal to the Court of Appeals of Kentucky with the assistance of counsel, that if he is financially unable to afford an appeal, a record will be prepared for him at public expense and counsel will be appointed to represent him, that an appeal must be taken within ten (10) days of the date of this judgment and that the clerk of the Court will prepare and file a notice of appeal in his behalf within that time if he so requests. The clerk was directed to file a notice of appeal in forma pauperis for defendant. Pending appeal defendant is to be held without bail.

JAMES PARK JR.
Judge, Fayette Circuit Court

FAYETTE CIRCUIT COURT
FIRST DIVISION
CRIMINAL BRANCH
APRIL 26, 1973

COMMONWEALTH OF KENTUCKY — Plaintiff

vs. Notice Of Appeal — No. 73C26 & 73C29

PAUL LEWIS HAYES — Defendant

* * * * *

Notice is hereby given that PAUL LEWIS HAYES, Defendant, hereby appeals to the Court of Appeals from the Judgment entered against him on April 23, 1973.

KATHERINE M. LADEN, C.F.C.C.

By: Judy Johnson, D.C.

ATTESTED COPIES TO:

Hon. Patrick Molloy
Commonwealth Attorney

Legal Aid
Scott Baesler
Attorney-at-Law

This: 26th day of April, 1973.

FAYETTE CIRCUIT COURT
FIRST DIVISION
MAY 16, 1973

COMMONWEALTH OF KENTUCKY, Plaintiff

vs: O R D E R No. 73C29

PAUL LEWIS HAYES, Defendant

* * * * *

The defendant having requested the Court to set bail pending an appeal to the Court of Appeals and the Court being advised, it is

ORDERED that this case be assigned for a hearing before Judge James Park, Jr. on Friday, June 1, 1973 at 1:30 p.m.

/s/ L. T. GRANT

Judge, Fayette Circuit Court
(Pursuant to RFCC 5 (c)

Attested copy to:

William Anthony Todd

Hon. James Odell

Mailed 5/16/73
R. True, D. C.

FAYETTE CIRCUIT COURT
FIRST DIVISION
June 1, 1973

COMMONWEALTH OF KENTUCKY, Plaintiff

vs. No. 73C29

PAUL LEWIS HAYES, Defendant

* * * * *

On motion of the defendant to set bail on an appeal to the Court of Appeals and the Court being advised it is

ORDERED that bail be set at $10,000.00.

/s/ JAMES PARK JR.

Judge, Fayette Circuit Court

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
FIRST DIVISION
JUNE 25, 1973

COMMONWEALTH OF KENTUCKY, **Plaintiff**

v. ORDER **No. 73-C-26**

PAUL LEWIS HAYES, **Defendant**

* * * * * *

Upon motion of Defendant pursuant to R.Cr. 12.58, and the Court being advised it is ORDERED AND ADJUDGED that the time for filing the record on appeal herein is hereby extended by sixty days making a total of one hundred twenty days to file the record on appeal.

This 25th day of June, 1973.

/s/ JAMES PARK JR.

Judge, Fayette Circuit Court

COPIES TO: HON. GLEN BAGBY
Ass't Commonwealth's Attorney

WILLIAM ANTHONY TODD
Attorney For Defendant

IN THE FAYETTE CIRCUIT COURT
LEXINGTON, KENTUCKY
No. 73C29
JULY 10, 1973

COMMONWEALTH OF KENTUCKY, **Plaintiff**

v. MOTION TO SUSPEND FURTHER EXECUTION OF SENTENCE

PAUL HAYES **Defendant**

* * * * *

Comes the defendant, Paul Hayes, who is without the services of an attorney, and acting as an attorney in his own behalf, respectfully moves this Court for an Order suspending further execution of the sentence of Life imposed upon him by this Court on or about the 23rd day of April, 1973, for the crime of Forgery-Habitual Criminal in violation of KRS 431.190 - 434.130.

This motion is made under the provisions of KRS 439.265 and is filed after more than thirty days, but less than sixty days, since the date of his delivery to the keeper of the institution to which he has been sentenced.

The defendant submits this motion before this Honorable Court for reasons which defendant feels justifiable as set forth in the attached Memorandum In Support.

WHEREFORE this defendant respectfully moves this Court to suspend further execution of the sentence imposed upon him in this case and to place defendant on probation upon such terms as the Court determines, not-

withstanding expiration of the term of Court during which this defendant was sentenced.

Rspectfully submitted,

/s/ PAUL L. HAYES

Defendant, In His Own Behalf
This 9th day of July, 1973

MEMORANDUM IN SUPPORT

The Defendant Paul Hayes moves this Court to suspend execution of his Sentence, and to place him on probation under the provisions of K.R.S. 439.265, and as reasons why this Motion should be sustained, the following is most respectfully submitted.

The Defendant is a Negro Male, 29 years of age, who prior to the judgment and sentence being imposed, resided at 532 Charlotte Court, Lexington, Kentucky, with his Mother, 2 sisters, and two brothers. Defendant contributed to the basic welfare of his family, who also are currently drawing public assistance from the local welfare department.

Should the Court see fit to entertain this application, defendant agrees to abide by the rules and regulations, and to not further violate the laws.

Defendant is a Horse worker and has been assured by his former employer that despite the conviction herein, Defendant can return to work in the same status, as existed, prior to the conviction by this Court.

The Defendant prays that this Court will entertain this application, and suspend further execution of the Sentence, and place him on probation.

So it is ever prayed.

Respectfully Submitted

/s/ PAUL L. HAYES
Defendant

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
FIRST DIVISION
JULY 11, 1973

COMMONWEALTH OF KENTUCKY, **Plaintiff,**

vs. O R D E R

Indictment No. 73-C-29

PAUL LEWIS HAYES, **Defendant**

* * * * * *

The defendant having made a motion under KRS 439.265 to suspend further execution of sentence, and the Court being advised, it is hereby ORDERED and ADJUDGED that the defendant's motion should be, and the same is hereby, overruled.

/s/ JAMES PARK, JR.
Judge

July 11 1973
Copy to:
Mr. Paul Lewis Hayes
c/o Eddyville Penitentiary
Eddyville, Kentucky

FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
FIRST DIVISION

COMMONWEALTH OF KENTUCKY, **Plaintiff**

vs. ORDER

No. 73-C-26
73-C-29

PAUL LEWIS HAYES, **Defendant**

* * * * * *

Upon motion of the defendant to appeal in forma pauperis and the Court having considered same,

IT IS HEREBY ORDERED AND ADJUDGE that the defendant, Paul Lewis Hayes, may prosecute his appeal without prepayment of fees and costs, and that the Fayette Fiscal Court shall pay to the court reporter her fee for preparation of the transcript of evidence.

This 21st day of August, 1973.

JAMES PARK JR.

_____
Judge, Fayette Circuit Court

STATE OF KENTUCKY

SCT.

COUNTY OF FAYETTE.

I, Katherine M. Laden, Clerk of the Fayette Circuit Court, in and for the County and State aforesaid, do hereby certify that the foregoing 25 pages, together with official Stenographer's Transcript of Evidence, in Vols. I and II, contain a full, true and correct copy, ordered copied as per Designation of Contents of Record on Appeal herein, of the record and proceedings in the cases wherein THE COMMONWEALTH OF KENTUCKY is Plaintiff and PAUL LEWIS HAYES is Defendant.. Nos. 73-C-26 and 73-C-29, actions lately pending in the aforesaid Court, as the same appears of record and are now on file in my said office.

Witness my hand as Clerk aforesaid, this 22nd day of August, 1973.

KATHERINE M. LADEN, C.F.C.C.

By /s/ Brenda Sabel, D.C.

In forma pauperis

[183]

FAYETTE CIRCUIT COURT
TRANSCRIPT OF EVIDENCE

MR. BAGBY: Yes, sir.

THE COURT: Mr. Todd, would you like to make a statement at this time?

MR. TODD: No, Your Honor, but I would like a brief opportunity to talk with Mr. Hayes at this time.

THE COURT: Ladies and Gentlemen of the Jury, we will take a short recess. During this period of time, you will remember the admonition which I have given to you previously in this case. It does apply in full. So, we will take about a ten-minute recess.

EVIDENCE FOR THE DEFENDANT

The defendant, PAUL LEWIS HAYES, resumed the stand. After being reminded by the Court that he was still under oath, he was examined and testified as follows:

DIRECT EXAMINATION BY MR. TODD:

D1 Paul, you have told the jury before, but I will ask you again, how old are you?

A. Twenty-nine.

D2 You were born in 1944?

A. Yes.

D3 This first charge that you were charged with was in 1961. How old were you when you were first charged with that offense?

[184]

A. Seventeen.

D4 Were you tried by a jury or did you plead guilty?
A. I plead guilty.

D5 To the charge of detaining a female?
A. Yes.

D6 Not to the charge of rape?
A. Yes.

D7 How old were you at that time?
A. Eighteen.

D8 You were sent to the penitentiary?
A. No.

D9 Where were you sent?
A. I was sent to the State Reformatory at La Grange, Kentucky.

D10 Tell the jury, based on your own experience, what the difference is between a penitentiary and a reformatory?
A. The penitentiary has a wall, maximum security, and the State Reformatory has a fence, you know. That

is the difference. See . . . uh . . . the penitentiary, you spend most of your time in cells, but at La-Grange it is just like a college, you do ~ just walk around the campus and things, you know.

D11 How long were you at La Grange, Paul?
A. Five years and three months.

D12 How old were you when you came out?
A. Twenty-three.

D13 Five years and three months. What was the year that

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you came out?
A. I came out in 1967.

D14 Then, in April of 1970, you were indicted on a charge of robbery, is that true?
A. Right.

D15 What sentence did you receive from the jury on that charge?
A. I was sentenced to five years.

D16 Did you serve any of that time?
A. No.

D17 Why not?
A. I was probated.

D18 Who probated you?
A. The courts.

D19 Do you know what the judge's name was that probated you?
A. Mitchell Meade.

D20 What is probation, Paul?
A. Probation is that you have to report to your probation officer every month, but you don't get any time, you just serve it out in the street, you know, you don't -- but, on the five years, I did not go to the institution, they probated me and put it on the shelf . . . on the time. It is still on the self, the five years is up right now . . . shelf time.

D21 And, you were still on probation when you were arrested

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for this offense?
A. Yes, this offense.

D22 Were you able to get out of jail before your trial on this case?
A. No, I was not.

D23 Why not?
A. See, my probation officer, he say that I wasn't – he say he didn't like the way that I was making money, you know. I said, "Man, I cannot work for this kind of money for $75.00 a week." I say, "It takes a lot

for a man to live on in these times, you know." He say, "Well, man, you don't have no kind of working record, man." I say, "Man, my job is flying. I fly horses from California to San Juan, Puerto Rico, you know," and, he say, "Well, I just have to take that job away from you, you know," and, then, I asked him if there was any way I could post bail, you know, and at that time my bond was a thousand dollars. He said, "I am going to keep you here in jail," and I have never made bond since November 20. I have been in jail ever since on that day.

D24 So, what have you done in preparation for your own defense in this case?
A. Explain yourself?

D25 What have you been able to help me do in preparing your defense in this case, having been in jail?

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WITNESS: I don't understand what you are talking about.

D26 Were you able to do anything more than talk to me?
A. I suppose that was the only thing I could do, that's all.

D27 Did you go out and talk to and look for witnesses?
A. No, I couldn't; I couldn't do that.

MR. BAGBY: I will have to object to this line of questioning as being irrelevant.

THE COURT: All right, I think I am going to give the defense a fairly free rein at this point. So, go ahead, Mr. Todd.

D28 You have seen Mr. Bagby prior to Thursday, had you not?

A. Yes.

D29 You, I, and Mr. Bagby have discussed this charge?

A. Yes.

D30 Tell the jury in your own words what you were originally indicted for and came to be indicted as a habitual criminal?

A. Well, I was indicted on uttering a forged instrument and the prosecutor told me, he say, well, uh . . . . " got five years for you this morning." I say, "No, man, I can't handle the five. you know." I say that I want a jury trial, you know. He say, "if you don't take the five years, I am going to indict you on the habitual criminal." I say, "Man, that is your job. There is nothing at this time that I can do nothing about it, but

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except a jury trial you know." Then, he calls me back over here the following week and they write out an indictment on me for habitual criminal, you know. I told him, "Look, man, you know, I have been in the State Reformatory one time and had one number on my back, you know," and, I said, "there's guys who have had six and seven numbers

on their back and they never was tried on the habitual criminal that came out of this court and all across the world, you know. Why do you want to put pressure on me to cop-out before a trial of something that I didn't do." He say, "Well, man, I am going to charge you with – I am going to indict you on the 'hibitch,' man," and that is what he has done, he indicted me on the habitual criminal, you know, and . . . then . . . I am facing another charge as a habitual criminal, you know. That's all I know.

D31 Do you know what the penalty would have been for the charge of uttering a forged instrument?

A. No, he didn't tell me that; he told me to cop-out for five years and, then, but the charge carries from two to ten . . . on uttering a forged instrument, you know.

D32 Is there –

A. I told him, "Man, how come you don't give me a break," and he said, "I am giving you a break with five years." "I take a jury trial on it, man," I said, and that is what I am doing. . . . April 19, I took a jury trial.

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D33 Is there any matter, Paul, that you would like for the jury to consider as they consider what sentence should be imposed for these trials?

A. I would like for them to . . . uh . . . uh . . . See, they don't know – I don't think they know what a

habitual criminal is, you know I don't thinks the jury knows what a habitual criminal is.

D34 Well, the Court will instruct the jury as to the law on the charge of the habitual criminal. Is there anything that you want the jury to know about you personally and your situation?

A. Yes.

D35 Tell them?

A. Ladies and Gentlemen of the Jury, I am speaking in my behalf at this time, that I was charged in 1962 on a charge of rape and I was involved with three guys. One is doing life now, and during that time, I was young. I was seventeen years old and just passing through this place and they involved me in it, you know. I stayed in jail at that time for eleven months on that same charge during that time and I waited and I . . . waited and the two guys that indicated me in the crime at that time talked in my behalf the -- and the prosecutor, Paul Mansfield, he said, "Paul, we are going to give you a plea and if you cop-out for seven years, that will be a good deal for you." I say, "Seven years is a long time

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out of a man's life for something that he didn't do." I was young and I didn't understand the law then like I know today and I went on and accepted the seven years and went on down to the State Re-

formatory and done my five years and three months as a serve-out and came out in 1967.

D36 Tell the jury what you mean by a serve-out?

A. A serve-out on a seven-year sentence -- I done it all; I done five years and three months . . . out of the seven, you know.

D37 Are you given any time off for good behavior?

A. Yes, I got three months -- I got ninety days off each year.

D38 Three months out of each twelve?

A. Yes.

D39 So, that the five years and three months added up to seven years?

A. Yes.

D40 And there was no parole?

A. No, there was no kind of people reporting to or nothing, you know.

MR. TODD: All right, go ahead.

A. (Cont'd) And, during that time, I was talking to this prosecutor . . . on this charge here . . . why that he wanted to indict me on the "hibitch." I explained it to him and we had a little argument as we chat a little bit

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in there, you know, and . . . and I kept talking

to him and said, "Man, there is people walking the streets right today that are seven- and eight-time losers and six-time losers and they have been convicted on armed robbery and all kinds of crimes." I say, "Them guys have come through these courts and they never was tried on a habitual criminal." I say, "I have had only one number on my back and you want to put me away for the rest of my life," and, I say, "But, I am not going to cop-out for the five years, you know, I am going to let the jury try me." He say, "Well, if that is what you got to do." I said, "I am going to take my odds with the jury, you know," and, that is the reason I am sitting here today. That is it, that is all I know.

MR. TODD: That is all.

CROSS EXAMINATION BY MR. BAGBY:

X1 Mr. Hayes, then, it is your testimony that you were convicted in this Court for detaining a female in 1962 and given seven years?

A. Right.

X2 Thereafter, you committed the crime of robbery for which you served -- for which you were convicted of in 1970 in this Court and given five years, is that correct?

A. Probated.

X3 But, you were found guilty, were you not?

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A. Yes.

X4 By a jury?

A. Yes.

X5 You had a lawyer trying your case for you, did you not?

A. Yes.

X6 And, then, on November 20, 1972, when you were arrested at the Pic-Pac market and charged with uttering this forged instrument, which the Court and jury has already found you guilty of, in the presence of Larry Wayne Frazier and taken to court, isn't it a fact that again you were appointed an attorney?

A. Yes.

X7 And, this attorney was present when you came to cop-out court, wasn't he?

A. Yes.

X8 Will you tell the jury what cop-out court is?

A. No, you tell them, I don't know . . . You tell them.

X9 Isn't it a fact that you were aware that cop-out court is the time when the prosecutor, the defense lawyer, the defendant, and the Clerk – like Mr. True – meet together not in the Judge's presence and before any jury is called and before any witnesses are subpoenaed, and the prosecutor makes a recommenda-

tion to the defendant, what he will recommend if the defendant intends to plead guilty to save the jury's time, the witnesses' time, and the court's time in coming to trial, isn't that right?

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A. No.

X10 All right, what is cop-out court, if that is not right?
A. Cop-out to me is that . . . uh . . . you offered me a five-year plea and you told me if I didn't take five years that you would indict me on the habitual criminal. That is what you done.

X11 All right, was the Judge there?
A. No.

X12 Was the jury there?
A. No.

X13 Was your lawyer there?
A. That's right, yes.

X14 And, I was there?
A. Yes.

X15 And, I made these statements to you all both in the presence of both of you, didn't I?
A. No.

X16 I didn't talk to you privately, did I?
A. No.

X17 Your lawyer, Mr. Wake, was there during the entire time, wasn't he?
A. That's right.

X18 And, then, I left you and Mr. Wake alone to discuss it by yourself -- by yourselves in a room by yourselves?
A. No, no, no.

X19 You and Mr. Wake did not discuss this matter by yourselves

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in a room and I left and, then, later I came back and asked what you wanted to do?
A. No, you walked out of the room and you threatened me with the habitual criminal, you know, and –

X20 And, then I walked out of the room, didn't I?
A. You walked out of the room.

X21 And, I told you that the law was that there was a habitual criminal act that I had to place against you?
A. No, you did not tell me that; you told me that you was indicting me on the "hibitch" if I didn't take the five-year plea. That is what you told me.

X22 Isn't it a fact that I told you at that time if you did not intend to plea guilty to five years for this charge and that they had caught you inside and that your accomplice had made a statement against you – isn't

it a fact that I told you at that time that if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?

A. No.

X23 I did not tell you that I was going to return to the grand jury?

A. No.

X24 I told you out of my own –

A. You told me that you was going to indict me – you told

me you was going to indict me on the habitual criminal and you called me back over here the following week on a Friday and I . . . answered the indictment on the habitual criminal. That was it. That was all that you told me.

X25 You were arraigned on that charge that the grand jury had brought against you, weren't you?

A. On the "hibitch."

X26 And, you were asked how you pled to the charge, weren't you?

A. Yes.

X27 And, at that time, you had a lawyer present too, didn't you?

A. Yes.

X28 In fact, you have had a lawyer throughout these proceedings, haven't you?

A. Sure, yeh.

X29 Now, when you first went to the Reformatory in 1962, you were eighteen years old, is that right?

A. Right.

X30 And, at that time, did you learn what the habitual criminal was?

A. Yeh, I learned that, yeh.

X31 What is the name that the people have at the penitentiary for the habitual criminal?

A. The "hibitch."

X32 The "hibitch," is that right?

A. Yes, the "hibitch."

X33 So, you knew in 1962 what the effects of the habitual criminal were?

A. No.

X34 But, you –

A. (Cont'd) Them guys coming in there with six and

seven times. No, I did not know what – I did not know that three convictions was a habitual criminal.

X35 But, some were coming in that had been convicted of a habitual criminal, wasn't there?

A. Yeh, six times . . . six-time losers.

X36 Some of them had been coming in there, hadn't there?

A. No, no, they was convicted on a six-time loser . . . in 1962.

X37 You have been aware that there is such a charge since 1962, haven't you?

A. Habitual criminal, yes.

X38 And, that was before the robbery and before the forgery, wasn't it?

A. That was – that was . . . uh . . . before the – you said before the robbery and after-?

X39 And before the forgery?

A. No.

MR. BAGBY: That's all.

THE COURT: Anything further, Mr. Todd?

MR. TODD: I have nothing further.

RENDERED: MARCH 1, 1974

COURT OF APPEALS OF KENTUCKY
FILE NO. 73-766

PAUL LEWIS HAYES — Appellant

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES PARK, JR., JUDGE
Indictment NOS. 73-C-26, 73-C-29

COMMONWEALTH OF KENTUCKY — Appellee

MEMORANDUM OPINION OF THE COURT BY JUSTICE JONES

AFFIRMING
(Not be be cited as authority)

Paul Lewis Hayes was convicted in the Fayette Circuit Court on a two-count indictment, charging him in Count No. 1 with the principal offense of uttering a forged instrument, under KRS 434.130, and in Count No. 2 of having been convicted of two prior felonies, under KRS 431.190. The trial court first tried Hayes on the principal offense of uttering a forgery, and then he was tried under the habitual criminal statute. The Jury found him guilty on both counts and fixed his punishment at confinement in the state penitentiary for life. Upon this appeal, Hayes contends: (1) the trial court erred in failing to direct a verdict in his behalf, he contending that the evidence was insufficient to support the conviction; (2) the trial court erred in failing to instruct the jury as to

the requirement of corroboration of the testimony of an accomplice; (3) he was denied due process and equal protection of the law by the habitual criminal conviction because the mandatory life sentence required by the statute is cruel and unusual punishment.

We have examined the evidence, and we are convinced that it establishes that appellant participated in the crimes with which he is charged. The Commonwealth proved that appellant presented a check to the Pic Pac grocery; that the check presented was stolen from Brown Machine Works; and that the check did not bear an authorized signature. Thus there was an inference that Hayes either had forged the unauthorized signature or knew it to have been forged. It was incumbent on him to satisfactorily explain the uttering or the forgery.

In Smith v. Commonweaalth, Ky., 307 S.W.2d 201, (1957), we stated:

> "When the evidence shows the name attached to the instrument has been forged, the inference arises that the person who uttered it as genuine either forged the instrument or knew it to be forged, and unless the uttering or forgery is explained satisfactorily, the presumption becomes conclusive." Smith v. Commonwealth, supra, 203.

Appellant's next contention, that the trial court should have given an instruction as to the requirement of corroboration of an accomplice's testimony, is wholly without merit. Appellant failed to object to the instructions in the trial court. The failure constituted a valid waiver so as to preclude Hayes from securing a reversal of his conviction upon the basis of any alleged error

therein. RCr 9.54(2); Johnson v. Commonwealth, Ky., 477 S.W.2d 159 (1972); Alsip v. Commonwealth, Ky., 482 S.W.2d 571 (1972).

Hayes next argues that his constitutional rights were abridged by the habitual criminal charge and by his subsequent conviction thereunder. He complains of the leverage available to the Commonwealth's Attorney in deciding whether or not to have an accused indicted under the Habitual Criminal Act, KRS 431.190.

In a pre-trial conference in this case, the Commonwealth's Attorney offered to recommend a five-year sentence if Hayes would plead guilty to the charge of uttering a forgery. This he refused to do although he was advised by the prosecutor that the case would be resubmitted to the grand jury for a new indictment under the Habitual Criminal Act. Based upon our holding in Cunningham v. Commonwealth, Ky., 447 S.W.2d 18 (1969), we conclude that it was not error for the Commonwealth's Attorney to resubmit the case to the grand jury. We save said:

> "Assuming, however, that the Commonwealth's Attorney was still in a position, in the event Cunningham had then chosen to plead not guilty, to resubmit the cases to the grand jury and ask for new indictments under the Habitual Criminal Act, we are of the opinion nevertheless that this is not the kind of pressure that could be held to affect the voluntariness of a guilty plea. A person charged with a criminal offense always is under the pressure of risking a maximum sentence at the hands of the jury or the court if he does not accede to what the Commonwealth is willing to

> recommend. The more serious the offense, the greater is the pressure, and it is even more so when the Commonwealth has a strong case. To say that the attorney for the Commonwealth could not use these advantages in discussing the terms and prospects of settlement on the basis of a guilty plea would mean simply that there could be no such settlements. We are unwilling to accept that result." Cunningham v. Commonwealth, supra, 83.

Here Hayes risked the maximum sentence of life imprisonment for a sentence of five years. He cannot now complain of his bad bargain.

Finally Hayes argues that a mandatory life sentence under the Habitual Criminal Act in his case is too severe a penalty, constituting cruel and unusual punishment. In light of the previous felonies of which he had been convicted, viz., detaining a female against her will (a lesser offense of rape), and robbery, we think the punishment is not too harsh. We have held the Habitual Criminal Act, KRS 431.190, to be constitutional. Barber v. Thomas, Ky., 355 S.W.2d 682 (1962).

The punishment authorized by the statute was not wrongly or disproportionately applied to the appellant. Accordingly the judgment is affirmed.

All concur,

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FILED JUNE 11, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT
LEXINGTON

PAUL LEWIS HAYES — Petitioner

vs. — Case No. 75-61

HENRY COWAN, WARDEN
KENTUCKY STATE PENITENTIARY — Respondent

PETITION FOR WRIT OF HABEAS CORPUS

Comes the Petitioner, with Counsel, and pursuant to Sec. 2254 of Title 28, United States Code petitions this Court for a Writ of Habeas Corpus, and as grounds states the following:

1. That he is presently incarcerated in the Kentucky State Penitentiary at Eddyville, Kentucky, on a life sentence imposed by Circuit Judge James Park of the Fayette County Circuit Court, Lexington, Kentucky, on the offense of being an habitual offender under KRS 431.190, Indictment Numbers 73-C-26, 73-C-29. This sentence was imposed on April 23, 1973.

2. That the Petitioner was found guilty by a jury after a trial pursuant to his not guilty plea.

3. That the Petitoner appealed the conviction to the Kentucky Court of Appeals, who affirmed the conviction in an opinion issued on March 1, 1974 which was not reported but a copy is attached to this Petition as Appendix I.

4. That the Petitioner was denied due process of law and equal protection of the law in that: a) the mandatory life sentence under Kentucky's Habitual Criminal Statute, KRS 431.190 is not uniformly applied and constitutes cruel and unusual punishment; b) the indictment and conviction under the Habitual Criminal Statute was vindictively sought by the Commonwealth of Kentucky in this case; and c) a life sentence in Petitioner's case is so disportionate that it constitutes cruel and unusual punishment.

5. That the facts which support the above grounds are as follows: a) The Petitioner at his own trial testified that he personally knew of inmates with six or seven felonies who had never been tried as a habitual criminal. His co-defendant in this case, testified about two previous felonies on which he had been convicted and yet he was not charged with being a habitual criminal. The Kentucky Court of Appeals took note of the fact that not everyone with two felony convictions had habitual criminal indictments sought against them (See *Byrd* v. *Commonwealth*, Ky., 463 S.W.2d 333 (1971);b) The Petitioner was indicted by the Fayette County Grand Jury on January 8, 1973 on the charge of uttering a forged instrument and was arraigned on that charge on January 19, 1973 at which time a pre-trial conference was set for Wednesday, January 24, 1973. A further pre-trial conference was set for January 26, 1973 at the January 24th pre-trial conference and another attorney was assigned to the Petitioner. On January 29, 1973 a new indictment was returned against the Petitioner charging him again with the Habitual Criminal Statute.

The Trial Court at the beginning of the trial an-

nounced that the trial would be bifurcated as to the principal charge and the charge under the Recidivism Statute. At the beginning of the second phase of the trial, the Petitioner, himself, made known to the Trial Court his objection to the manner he was indicted on the habitual criminal charge. He stated that the Commonwealth offered him five years to plead guilty on the principal charge and further said that if he didn't take the five years, he would be indicted as a habitual criminal, which was never refuted by the Commonwealth. The petitioner in his testimony testified that his refusal to plead guilty was why he had been indicted under the habitual criminal statute, again not refuted by the Commonwealth. In fact, the Assistant Commonwealth Attorney, Hon. Glen S. Bagby, in his questioning supported Petitioner's contention by asking the following question:

> Isn't it a fact that I told you at that time if you did not intend to plead guilty to five years for this charge and that they had caught you inside and that your accomplice had made a statement against you — isn't it a fact that I told you at that time that if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?

All of these uncontroverted facts establish that the Petitioner was indicted under Kentucky's Habitual Criminal Statute as a vindictive action by the Commonwealth because he refused to plead guilty; c) Petitioner is now twenty-nine years old and when the charge on the first felon was brought against him he was a seventeen year

old minor. He plead guilty to the charge and served five years and three months at the Kentucky State Reformatory at La Grange, Kentucky. His next charge was that of robbery for which a jury gave him a sentence of five years. However, he was probated for that charge. The prior criminal record of the Petitioner is not one which suggests that it is necessary to confine him in a penal institution for the rest of his life in order to prevent him from further commission of crime. His first offense, certainly the most serious, was committed while he was a minor; the second was such that a judge granted him probation, and for the third offense, the least serious, he receives a mandatory life sentence.

6. That Petitioner has not filed any Motions pursuant to RCr 11.42 in Kentucky's Court, nor other Petition for Writ of Habeas Corpus in State or Federal Court, or any Petitions for Writ of Certiorari in the United States Supreme Court. A Notice of Appeal to the Kentucky Court of Appeals and outlined in paragraph 3.

7. That all the grounds set forth in paragraph 4 and the facts set forth in paragraph 5 were raised in Petitioner's appeal to the Kentucky Court of Appeals and were discussed in their Opinion.

8. That he was represented at arraignment by both A. Norrie Wake, 101 N. Limestone Street, Lexington, Kentucky 40507 and William A. Todd, 145 Market St., Lexington, Kentucky 40507; that Mr. Todd also represented Petitioner at trial. That the Petitioner was represented on appeal and in this action by Paul F. Isaacs, 625 Leawood Drive, Frankfort, Kentucky 40601.

That based on the allegations set out above, the Pe-

titioner respectfully prays that this Court issue a Writ of Habeas Corpus in this action.

/s/ PAUL LEWIS HAYES

Petitioner

Paul Lewis Hayes, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the ifformation therein is true and correct to the best of his knowledge and belief.

/s/ PAUL LEWIS HAYES, Affiant

Subscribed and sworn to before me this 29 day of Jan., 1975.

/s/ H. R. PATTERSON
Notary Public

My Commission Expires: 12-22-78.

/s/ PAUL F. ISAACS
Assistant Public Defender
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Frankfort, Kentucky 40601

Counsel for Petitioner

UNITED STATES DISTRICT COURT
EASTERN DISTRICT

PAUL LEWIS HAYES — Petitioner

vs. — Case No ____

HENRY COWAN, Warden
KENTUCKY STATE PENITENTIARY — Respondent

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

I.

THE MANDATORY LIFE SENTENCE REQUIRED BY THE HABITUAL CRIMINAL STATUTE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AS NOT UNIFORMLY APPLIED.

It should be noted that since the death penalty was struck down in *Furman* v. *Georgia*, 408 US 238, 92 S. Ct. 2726, 33 LEd 2d 346 (1973), and at the time of Petitioner's conviction, Kentucky had only two other crimes with mandatory life sentences — Murder, KRS 435.010, and Rape of a Child under Twelve, KRS 435.080. In all other crimes, the jury is given discretion in determining the degree of the sentence in terms of years or life. Also, under Kentucky's Habitual Criminal Statute, KRS 431.190, the nature of the previous felonies is not taken into consideration. Three nonviolent felonies can result in a life sentence the same as three violent crimes. The *Furman, supra*, case established as one of the criteria for prohibit-

ing the death penalty that the sentence was not uniformly applied to all those subject to that penalty. As Mr. Justice Stewart said:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968,[11] many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.[12] * * * * * * I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed. *Id.* at pp. 309, 310.

The imposition of the mandatory life sentence under the Habitual Criminal Statute is also randomly applied in Kentucky, as the facts set forth in the Petition for a Writ of Habeas Corpus establish.

Since the Habitual Criminal Statute is used randomly by Prosecutors without any guidelines or standards, it constitutes cruel and unusual punishment. One of the *Furman*, supra tests is the fairness and uniformity by which the punishment is applied. The procedures prevalent in Kentucky and followed in this case of arbitrarily seeking indictments for being a habitual criminal against some defendants and not for others constitute cruel and unusual punishment. The Eighth Amendment prohibition against cruel and unusual punishment incorporates the equal protection clause of the Fourteenth Amendment and requires that punishment be administered uniformly.

The life sentence given the Appellant in this case certainly violate the *Furman,* supra standards and should be set aside.

11

THE COMMONWEALH VINDICTIVELY SOUGHT AN INDICTMENT UNDER THE HABITUAL CRIMINAL STATUTE BECAUSE THE APPELLANT REFUSED TO PLEAD GUILTY.

This case illustrates the sordid affair plea bargaining can become if courts refuse to exercise any control over the heavy-handed tactics of prosecutors. The Petitioner merely maintained his innocence during the plea bargaining session and insisted on his right to a jury trial and because he chose to exercise his constitutional rights, the Commonwealth sought an indictment under Kentucky's recidivism statute.

The procedures employed in this case are so blatantly vindictive as to violate due process as set forth in *Pearce* v. *North Carolina,* 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). The threat of prosecution for being a habitual criminal should not be allowed to exist as a cudgel to coerce a man who maintains his innocence to enter a plea of guilty. *Pearce* v. *North Carolina, supra,* clearly sets forth the principle that vindictiveness by a court against a defendant exercising, in that case not a constitutional right but a statutory right, his right to appeal denies that defendant due process of law and this same principle was applied to county attorneys in *Sefcheck* v. *Brewer,* 302 F. Supp. 793 (1969). Surely due process of law prohibits a Commonwealth Attorney from seeking an indictment against the Petitioner because he

demands a jury trial in which the maximum penalty for the present indictment was ten years and by adding the habitual criminal count increased the penalty to mandatory life imprisonment. The Petitioner submits that the concept of due process minimumly prohibits prosecutors from taking undue advantage over a defendant accused of a crime who maintains his innocence. There should be no place in our system for vindictive prosecutions based solely on the defendant's insistence on his constitutional right to a jury trial.

III

THE MANDATORY LIFE SENTENCE REQUIRED BY THE HABITUAL CRIMINAL STATUTE IS CRUEL AND UNUSUAL PUNISHMENT IN THIS CASE.

In *Hart* v. *Coiner*, 483 F. 2d 136, (4th Cir. 1973), cert. denied March 18, 1974, the Fourth Circuit set forth four standards for evaluation: a) Nature of the Offense; b) legisiative purpose; c) comparison of penalty with other states; and d) comparison of penalty with other offenses with the same penalty. In that case, the Fourth Circuit held:

> The doctrine that an excessive sentence may be invalid solely because of disproportionality is not a new one. Mr. Justice Field suggested in 1892 that the eighth amendment's prohibition is directed not only against torture or barbarism, "but (also) against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." *O'Neil* v. *Vermont*, 144 US 323, 339 (1892) (Field, J., dissenting).

In *Weems* v. *United States*, 217 US 349, 367 (1910), the Court adopted Mr. Justice Field's view of the eighth amendment when it stated that it is now "a precept of justice that punishment for crime should be graduated and proportioned to offense." In *Weems*, the Court noticed, with apparent approval, that the highest state court of Massachusetts had previously conceded the possibility that "punishment in the state prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment." Weems, supra, at 368; accord, *Ralph* v. *Warden*, 438 F. 2d 786 (4th Cir. 1970).

In his concurring opinion in Furman, Mr. Justice Douglas finds the idea of disproportionality as old as the Magna Carta: "A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity . . ." *Furman, supra*, at 243.

While it seems settled that punishment must be proportioned to the offense committed, application of this principle to a particular fact situation is not without difficulty. That the proportionality concept is not static, but is a "progressive" one which "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," enhances the difficulty. *Trop* v. *Dulles*, 356 US 86, 101 (1958).

Although the standard applicable under the eighth amendment is one "not susceptible to precise defini-

> tion," there are several obective factors which are usful in determining whether the sentence in this case is constitutionally disproportionate. The test to be used is a cumulative one focusing on an anlysis of the combined factors. *Furman, supra,* at 282 (Brennan, J., concurring). (*Id.* at pp. 139-140)

The *Hart, supra,* case then went on to analyse Dewey Hart's conviction in light of the four standards.

The Petitioner was indicted and convicted of uttering a forgery which has a maximum penalty of ten years. KRS 434.130. He was also indicted under Kentucky's Recidivism Statute which carries a mandatory life imprisonment penalty. KRS 431.190. The two previous felonies the Petitioner had been convicted of were Detaining a Female Against Her Will in 1962 and Robbery in 1971.

The nature of the principal offense and the prior offenses is one of the most important considerations in determining whether the mandatory life sentence is cruel and unusual in Petitioner's case. An analysis of Petitioner's convictions reveal that the most serious offense, the first one, was committed while he was a minor. It is interesting to note that under Kentucky's newly adopted Penal Code, the conviction of Petitioner while he was a juvenile could not be considered toward a habitual criminal. KRS 532.080(b) Under that statute the Petitioner would not be a persistent felony offender. Even if the Petitioner's first felony were taken into consideration, the most the Petitioner would receive under the new Penal Code would be twenty years. The very state which is now incarcrating Petitioner for life has now rejected the mandatory provisions of their previous recidivism statute.

The prior criminal record of the Petitioner is not one which suggests that it is necessary to confine him in a penal institution for the rest of his life in order to prevent him from further commission of crime. His first offense, certainly the most serious, was committed while he was a minor; the second was such that a judge granted him probation, and now the third offense, the least serious, for which he receives a mandatory life sentence. The life sentence is so harsh and unjustifiable on any rehabilative or humane principal of treatment of criminal offenders as to constitute cruel and unusual punishment.

For the reasons stated above, the Petitioner respectfully requests that a Writ of Habeas Corpus be issued.

PAUL F. ISAACS
ASSISTANT PUBLIC DEFENDER
625 Leawood Drive
Frankfort, Kentucky 40601

/s/ Paul F. Isaacs

COUNSEL FOR PETITIONER

FILED JUNE 11, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL LEWIS HAYES ..... PETITIONER

VS MAGISTRATE'S REPORT
AND RECOMMENDATION

HENRY COWAN, Warden, Etc. ..... RESPONDENT

* * * * *

The petitioner, alleging that he is incarcerated in the State Penitentiary at Eddyville, has tendered for filing a petition for writ of habeas corpus. He has filed therewith a motion for leave to proceed *in forma pauperis*, which motion is supported by an affidavit of poverty. In accordance with 28 U.S.C. §636(b), and pursuant to a General Order of this Court, the aforesaid documents have been referred to the undersigned Magistrate for preliminary review.

In his tendered pleading the petitioner alleges that his confinement is the result of his convictions, following a bifurcated trial, of the offenses of forgery and of being a habitual criminal. He contends that his conviction as a habitual criminal violates his constitutional rights in that the mandatory sentence of life imprisonment imposed upon such conviction amounts to cruel and unusual

punishment; in that the selective application of Kentucky's habitual criminal statute causes said life sentence to amount to cruel and unusual punishment; and in that the "vindictive" application of the habitual criminal statute to the petitioner violates his right to due process of law. A copy of an opinion of the Kentucky Court of Appeals attached to the tendered petition demonstrates that the petitioner has presented substantially identical contentions to the Kentucky courts by direct appeal.

In the opinion of the Magistrate, the tendered petition is patently without merit. As held in *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962), "the constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge". Moreover, only in the deliberate presence of such factors as race, religion or other arbitrary classification will the courts review the exercise of prosecutorial selection and discretion, even when the exercise of such discretion results in different treatment of co-defendants originally charged with the same offenses in the same case. *Oyler* v. *Bols*, *supra* at page 456; *United States* v. *Bland*, 472 F. 2d 1329, 1336 (D.C. Cir. 1972), cert. denied 412 U.S. 909.

There is authority for the proposition that any sentence, including a mandatory sentence of life imprisonment upon conviction of being a habitual criminal, may amount to cruel and unusual punishment, if wholly disproportionate to the nature of the underlying offense and unnecessary to the achievement of any legitimate legislative purpose. *Weems* v. *United States*, 217 U.S. 349 (1910); *Hart* v. *Coiner*, 483 F. 2d 136, 143 (4th Cir. 1973), cert. denied 415 U.S. 938. However, as noted by the Kentucky

Court of Appeals in the instant case, the convictions underlying the petitioner's habitual criminal conviction were detaining a female (a lesser included offense of the charge of rape), robbery and forgery. As conceded by the petitioner, the subject felonies occurred during a 12 year period beginning when the petitioner was 17 years old. One convicted of violating Kentucky's habitual criminal statute is not thereby rendered ineligible for parole, and, in the opinion of the Magistrate, it cannot be said that it is shocking, disproportionate or unnecessary to a legitimate legislative purpose to require one with a record such as that admitted by the petitioner to serve a substantial period of actual incarceration and to be subject to parole supervision for the rest of his life.

The petitioner's remaining complaints derive from the fact that not all Kentucky defendants having prior felony convictions are prosecuted under the state's habitual criminal statute and that the petitioner was so prosecuted only upon his refusal to plead guilty to the substantive offense of forgery, in return for a five year sentence. It is well settled that there is nothing unconstitutional, *per se*, in the concept of plea bargaining and that a defendant's constitutional rights are not violated by forcing him to choose between a lesser penalty, in return for the entry of a plea of guilty, as opposed to exposing himself to the risk of a greater penalty if he elects to be tried upon a plea of not guilty. *Santobello* v. *New York*, 404 U.S. 257 (1971); *North Carolina* v. *Alford*, 400 U.S. 25 (1970). If prosecutors were precluded from seeking conviction of more serious offenses following the rejection by defendants of the opportunity to plead guilty to lesser offenses, the entire concept of plea bargaining

would be effectively destroyed, and, as noted previously herein, in the absence of some claim of invidious discrimination, a defendant's rights are not violated simply because a prosecutor may elect to use the leverage of an applicable habitual criminal statute against him, while not use the same leverage against other defendants.

In summary, it would appear that the petitioner's position was well stated by the Kentucky Court of Appeals in the opinion appended to the tendered petition. As noted by that Court, the petitioner risked the maximum sentence of life imprisonment for a sentence of five years. He cannot now complain of his bad bargain.

The Magistrate will this day enter an Order granting the petitioner leave to proceed *in forma pauperis* and directing that the petition for writ of habeas corpus heretofore tendered by the petitioner be filled herein. However, for those reasons discussed above, it is the Magistrate's recommendation that said petition be denied and that this action be dismissed.

This 11th day of June, 1975.

DAVID R. IRVIN

David R. Irvin, U.S. Magistrate

FILED JUNE 11, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL LEWIS HAYES ..... PETITIONER

VS ORDER NO. 75-61

HENRY COWAN, Warden, Etc ..... RESPONDENT

* * * * *

The petitioner having heretofore tendered for filing a petition for writ of habeas corpus and having filed therewith a motion for leave to proceed *in forma pauperis*, which motion is supported by an affidavit of poverty, it is now therefore ORDERED that the petitioner be granted leave to proceed *in forma pauperis* and that the petition for writ of habeas corpus heretofore tendered for filing by the petitioner be filed herein.

This 11th day of June, 1975.

DAVID R. IRVIN

David R. Irvin, U.S. Magistrate

FILED SEPTEMBER 9, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL LEWIS HAYES ..... PETITIONER

VS ORDER CIVIL NO. 75-61

HENRY COWAN, Warden, Etc. ..... RESPONDENT

* * * * *

The Court having considered the entire record herein, including the Magistrate's Report and Recommendation heretofore filed herein on June 11, 1975, and being sufficiently advised;

IT IS NOW THEREFORE ORDERED AND ADJUDGED HEREIN AS FOLLOWS:

(1) That the Magistrate's Report and Recommendation heretofore filed herein be and the same is hereby adopted, confirmed, approved, allowed and established as and for the Court's Findings of Fact and Conclusions of Law herein.

(2) That the petitioner's Petition for Writ of Habeas Corpus be and the same is hereby denied.

(3) That this cause be and the same is hereby dismissed.

This the 9th day of September, 1975.

BERNARD T. MOYNAHAN, JR.

Bernard T. Moynahan, Jr., Judge

FILED OCTOBER 9, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

PAUL LEWIS HAYES Petitioner	)	
V.	)	CIVIL NO. 75-61
HENRY COWAN, Superintendent, Kentucky State Penitentiary, Respondent	)	

NOTICE OF APPEAL

Notice is hereby given that the Petitioner appeals from the order in the above styled action entered on September 9, 1975 dismissing the above styled action.

Respectfully submitted,

PAUL F. ISAACS
ASSISTANT PUBLIC DEFENDER
625 Leawood Drive
Frankfort, Kentucky 40601

COUNSEL FOR PETITIONER

FILED OCTOBER 9, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

PAUL LEWIS HAYES Petitioner	)	
V.	)	CIVIL NO. 75-61
HENRY COWAN, Superintendent, Kentucky, State Penitentiary, Respondent	)	

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE

Pursuant to 28 U.S.C. §2253, the above-named Petitioner requests that he be granted a Certificate of Probable Cause for the appeal in the above-captioned action.

Respectfully submitted,

PAUL F. ISAACS
ASSISTANT PUBLIC DEFENDER
625 Leawood Drive
Frankfort, Kentucky 40601

COUNSEL FOR PETITIONER

NOTICE

Please take notice that the foregoing Motion will be filed on the 9th day of October, 1975 with the Clerk of the United States District Court for the Eastern District of Kentucky at Lexington.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been mailed, postage prepaid to Hon. Ed W. Hancock, Attorney General, Capitol Building, Frankfort, Kentucky 40601, this 9th day of October, 1975.

FILED DECEMBER 19, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PAUL LEWIS HAYES ..... PETITIONER

VS. ORDER CIVIL 75-61

HENRY COWAN, Superintendent
Kentucky State Penitentiary ..... Respondent

* * * * *

This petition for a Writ of Habeas Corpus is grounded on the claim of petitioner that his conviction as a habitual criminal violates his constitutional rights in that: the mandatory sentence of life imprisonment imposed upon such conviction equates to cruel and unusual punishment; the selective application of Kentucky's habitual criminal statute causes said life sentence to amount to cruel and unusual punishment; and the allegedly "vindictive" application of the habitual criminal statute to the petitioner violates his due process of law.

The claim that the mandatory life imprisonment sentence imposed upon one convicted of the Kentucky habitual criminal statute equates to cruel and unusual punishment is clearly without merit. As was well stated in *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962):

". . . the constitutionality of the practice of inflict-

ing severe criminal penalties upon habitual offenders is no longer open to serious challenge".

Moreover, absent some arbitrary classification, the courts will abjure the review of prosecutorial discretion, albeit the exercise of such discretion may result in different treatment of co-defendants originally charged with identical offenses in the same case. *Olyer* v. *Boles, supra* at page 456.

The Court observes that the convictions underlying the petitioner's habitual criminal conviction were crimes of a most serious nature and thereby concludes that the sentence received upon conviction of being a habitual criminal was not disproportionate to the nature of the underlying offenses, and that the mandatory sentence imposed was necessary to the achievement of a legitimate legislative purpose.

Petitioner's remaining claims emanate from the fact that not all Kentucky defendants having the requisite number of prior felony convictions are prosecuted under the state's habitual criminal statute and that petitioner was so prosecuted only upon his refusal to plead guilty to the substantive offense of forgery in return for a five (5) year sentence.

It being well established that the concept of plea bargaining, *per se*, is not unconstitutional. *Santobollo* v. *New York*, 404 U.S. 257 (1970). It is apparent from a review of the record in that no encroachment was made upon petitioner's constitutional rights, that the petitioner chose to risk the maximum sentence of life imprisonment under the Kentucky habitual criminal statute by electing

to proceed to trial, rather than accepting a sentence of five (5) years in return for a plea of guilty to the forgery charge then lodged against him.

The petitioner, therefore, has no cause for complaint merely because his "choice" resulted in a substantially greater sentence than would have otherwise been imposed had he accepted to proffered "bargain".

The Court specifically finds that the appeal sought herein is frivolous, is not taken in good faith, and does not present a substantial question, and same is therefore denied and the Court declines to issue a Certificate of Probable Cause herein.

This the 19th day of December, 1975.

BERNARD T. MOYNAHAN, JR.

Bernard T. Moynahan, Jr., Judge

NO. 76-8006

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL LEWIS HAYES,
Petitioner-Appellant

V. ORDER

HENRY COWAN, Warden,
Respondent-Appellee

The court treating the notice of appeal filed by the petitioner as an application for certificate of probable cause, an application having been previously made to the district court and having been denied, upon consideration.

IT IS ORDERED that said application be and it is hereby granted.

/s/ Albert J. Engel,

Albert J. Engel,
Circuit Judge

NO. 76-1409

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL LEWIS HAYES,
Petitioner-Appellant,

V.

HENRY COWAN, Warden,
Respondent-Appellee.

APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed December 30, 1976.

Before: PECK, McCREE, and LIVELY, Circuit Judges.

McCREE, Circuit Judge. This is an appeal from the denial of a petition for habeas corpus challenging confinement based on Hayes' conviction of being an habitual criminal under Kentucky's recidivist statute, K.R.S. §431.190.[1] The district court referred the petition to a magis-

[1]At the time of appellant's conviction the statute provided:

> Conviction of felony; punishment on second and third offenses. Any person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall

trate to determine whether leave to proceed *in forma pauperis* should be granted pursuant to 28 U.S.C. §1915(a). Although the magistrate ordered the petition filed and determined that petitioner's claims were not so frivolous that *in forma pauperis* leave should not be granted, nevertheless, he concluded that the contentions made were "patently without merit" and recommended that the petition be dismissed. The district court adopted the magistrate's conclusions and, instead of issuing an order to the respondent to show cause as provided in 28 U.S.C. §2243, it dismissed the petition on the grounds that the mandatory life sentence imposed for the habitual criminal conviction did not constitute cruel and unusual punishment, that petitioner had not been arbitrarily selected for prosecution as an habitual criminal, and that the state prosecutor's decision to seek an habitual criminal indictment when petitioner refused to plead guilty to the charge of forgery in return for a recommendation of a five-year sentence was not an unconstitutional implementation of plea bargaining.

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not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state.

It has since been repealed. According to §532.080, which now regulates " persistent felony offender sentencing," the special sentence may be imposed only if, for each of two previous felony convictions, the sentence was at least one year; defendant was imprisoned under each such sentence before commission of the instant felony; and the offender was over eighteen years of age at the time he committed each offense. Petitioner would not have been subjected to enhanced sentencing under §532.080, because none of these conditions were satisfied.

We issued a certificate of probable cause to permit an appeal when the district court, determining that an appeal would be frivolous and not taken in good faith, declined to do so. Because we conclude that petitioner was denied the due process of law by the prosecutor's tactics, we reverse.

The facts which led to petitioner's conviction and incarceration are not disputed.[2] On January 8, 1973, he was indicted for forgery of a check in the amount of $88.30 by a Fayette County, Kentucky grand jury. After arraignment, a pretrial conference was held with the state prosecutor. During this conference, the prosecutor offered to recommend a five-year sentence if Hayes would plead guilty. Petitioner was warned that if he did not plead guilty, he would be charged under the habitual criminal statute. He refused to plead guilty, but insisted on receiving a full trial. The prosecutor thereupon returned to the grand jury, and on January 29, 1973, obtained a new indictment charging petitioner under the habitual criminal statute based upon the forgery as a third offense. Petitioner was convicted by a jury, and

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[2]These facts were admitted by the prosecutor during his cross-examination of appellant at the sentencing trial:

> . . . isn't it a fact that I told you if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?

on the instructions of the judge, the mandatory life sentence for a third offense habitual criminal was imposed.[3]

We recognize that plea bargaining now plays an important role in our criminal justice system. In *United States* v. *Brady*, 397 U.S. 742, 752 (1970), the Supreme Court approved the practice, and stated that plea bargaining helps to conserve judicial and prosecutorial resources in cases in which there is no substantial issue about the defendant's guilt. The Court has recognized, however, that there are limits to the tactics that a prosecutor may use in bargaining with defendants. See *Santobello* v. *New York*, 404 U.S. 257 (1971). The Court has not yet had an opportunity to explore fully these limits, particularly in cases such as this, "where the prosecutor . . . deliberately employ[ed his] charging . . .

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[3]We expressed our disapproval of such practices in **Cunningham** v. **Wingo**, 443 F. 2d 195, 198 n.1 (1971). In that case we noted the findings of the President's Commission of Law Enforcement and Administration of Justice in **The Challenge of Crime in a Free Society** (1967):

> "At the same time the negotiated plea of guilty can be subject to serious abuses. In hard-pressed courts, where judge and prosecutors are unable to deal effectively with all cases presented to them, dangerous offenders may be able to manipulate the system to obtain unjustifiably lenient treatment. There are also real dangers that excessive rewards will be offered to induce pleas **or that prosecutors will threaten to seek a harsh sentence if the defendant does not plead guilty**. Such practices place unacceptable burdens on the defendant who legitimately insists upon his right to trial. * * *" (Emphasis supplied.)

powers to induce a particular defendant to tender a plea of guilty." *Brady, supra,* at 751 n.8. But it is clear that the legitimate purposes of plea bargaining are not served if a prosecutor abuses his powers in order to coerce an unwilling defendant into foregoing his constitutional right to trial.

The Supreme Court has held that defendants who assert procedural rights must be treated in a way that avoids any suggestion of vindictive or retaliatory motive. In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), the Court held that a defendant may not be subjected to a more severe penalty on retrial after a successful collateral attack against a conviction. The Court reasoned that due process requires that a defendant be free from fear of retaliatory action when he asserts procedural rights. Therefore a defendant may not be dealt with more harshly on retrial unless the permissible reasons therefor affirmativly appear.

In *Blackledge* v. *Perry*, 417 U.S. 21 (1974), the Court applied the rule expressed in *Pearce* to protect defendants from the vindictive exercise of a prosecutor's discretion. In that case, a defendant in a misdemeanor prosecution had asserted his right to a trial de novo on appeal. Before the new trial, the prosecutor obtained a felony indictment against the defendant. The Court held that this tactic, if allowed, would deter defendants from asserting their procedural rights. The Court emphasized that the prosecution should not be allowed to behave in a manner that even suggests a retaliatory motive.

The concerns expressed in *Blackledge* have persuaded several lower courts to limit the prosecutor's dis-

cretion in related situations. In *United States* v. *Jamison*, 505 F. 2d 407 (D.C. Cir. 1974), the court reversed a conviction of first degree murder obtained after the defendants had been granted a mistrial during an earlier trial based on an indictment for second degree murder. In *United States* v. *DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975), the court refused to allow prosecution of an indictment obtained after a defendant had asserted his right to a change of venue of a trial on an indictment charging less serious offenses. In *United States* v. *Ruesga-Martinez*, 534 F. 2d 1367 (9th Cir. 1976), the court held that a defendant cannot be tried on a felony indictment after he has refused to plead guilty to a misdemeanor, if no justification of the increase in severity of the charges is offered. See also *United States* v. *Gerard*, 491 F.2d 1300 (9th Cir. 1974); *United States* v. *Butler*, 515 F. Supp. 394 (D. Conn. 1976); *Sefchek* v. *Brewer*, 301 F. Supp. 793 (D. Iowa 1969).

We hold that a similar potential for impermissible vindictiveness exists when a prosecutor is allowed to bring an habitual offender indictment against a defendant who has refused to plead guilty to an indictment for the same unenhanced substantive offense. In this case the prosecutor does not assert that any event occurred between the issuance of the first indictment and the issuance of the second to influence his decision except petitioner's insistence upon his right to trial. There is no indication that the prosecutor, had he thought such an indictment proper, could not have included the habitual criminal charges in the original indictment.

The Commonwealth urges that the entire concept of

plea bargaining will be destroyed if prosecutors are not allowed to seek convictions on more serious charges if defendants refuse to plead guilty. We do not agree. Although a prosecutor may in the course of plea negotiations offer a defendant concessions relating to prosecution under an existing indictment, see *United States ex rel. William* v. *McMann*, 436 F. 2d 103 2d Cir. 1970), *cert. denied*, 402 U.S. 914 (1971), he may not threaten a defendant with the consequence that more severe charges may be brought if he insists on going to trial. When a prosecutor obtains an indictment less severe than the facts known to him at the time might permit, he makes a discretionary determination that the interests of the state are served by not seeking more serious charges. Cf. *United States* v. *Johnson*, 537 F. 2d 1170 (4th Cir. 1976). Accordingly, if after plea negotiations fail, he then procures an indictment charging a more serious crime, a strong inference is created that the only reason for the more serious charges is vindictiveness. Under these circumstances, the prosecutor should be required to justify his action. In this case, a vindictive motive need not be inferred. The prosecutor has admitted it.

Therefore we hold that due process has been offended by placing petitioner in fear of retaliatory action for insisting upon his constitutional right to stand trial. Accordingly, the dismissal of the petition is reversed and the case is remanded with instructions to order petitioner's discharge except for his confinement under a lawful sentence imposed solely for the crime of uttering a forged instrument.

UNITE DSTATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 76-1409

PAUL LEWIS HAYES
PETITIONER-APPELLANT

V. MOTION FOR STAY OF MANDATE

HENRY COWAN, Warden
RESPONDENT-APPELLEE

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF KENTUCKY AT LEXINGTON

Respondent-Appellee, by counsel, respectfully presents this application for, and moves the Court to enter, an order staying the issuance of the mandate in this case pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure for thirty (30) days because it is the intention of Respondent-Appellee to make proper and timely application to the Supreme Court of the United States for

writ of certiorari to review the decision of the Sixth Circuit in the above-styled action.

Respectfully submitted,

ROBERT F. STEPHENS
ATTORNEY GENERAL

By: ROBERT L. CHENOWETH
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR
RESPONDENT-APPELLEE

NOTICE

Please take notice that the foregoing Motion will be filed with the Clerk of the United States Court of Appeals for the Sixth Circuit by mailing an original and three copies thereof this 25th day of January 1977, to be considered at the convenience of the Court.

Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Motion were mailed, postage prepaid, to Honorable J. Vincent Aprile, Assistant Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601 on January 25, 1977.

Assistant Attorney General

FILED FEBRUARY 2, 1977

FOR THE SIXTH CIRCUIT

NO. 76-1409

PAUL LEWIS HAYES

Petitioner-Appellant

V.

HENRY COWAN, WARDEN

Respondent-Appellee

BEFORE: PECK, McCREE and LIVELY, Circuit Judges

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk